

**ואי דוכתא דמחזקינן בגונדרי תרוייהו משלמי –**

**And if it is a place which is known to be rocky; both pay**

### **OVERVIEW**

The גמרא cites a dispute; which of the workers is liable to pay when the plow broke (in a case of שני) whether it is the one who is holding the פרשא (the guiding rod [the view of פפא]), or the one who is נקיט מנא (the plow blade [רב שישא]). [The הלכה is that משלם מנא.] The גמרא concludes that if it is a place where מחזקי גונדרי, both pay.

**פירש בקונטרס<sup>1</sup> משום דהוי ספק מי עשה -**

**explains, the reason both are liable is because there is a doubt as to who made the damage.**

פרש"י disagrees with תוספות:

**ואין נראה דלא קיימא לן (בבא קמא דף לה,ב:) כסומכוס<sup>2</sup> -**

**And this explanation does not appear to be correct, for we do not rule like סומכוס** who maintains - ממון המוטל בספק חולקים

**אלא כרבנן והמוציא מחבירו עליו הראיה ואי הוה ספק הוי שניהם פטורים<sup>3</sup> -**

**But rather we rule like the רבנן, who maintain הראיה עליו מחבירו (whoever wishes to extract money from his fellow, he is obligated to prove it), so if there is a doubt as to who caused the damage they would be both exempt from paying.**

תוספות offers his explanation:

**אלא נראה לי דהכא שניהם פשעו כיון דמחזקא בגונדרי הוא נשבר מאד בקל -**

**Rather it appears to תוספות that in this case both workers are negligent, for since this place is known to be rocky, the plow can break very easily -**

**והיה לכל אחד ליתן לב על חבירו כמו על עצמו ולהזהירו<sup>4</sup> ואחרי שלא הזהירו גם הוא פשע:**

<sup>1</sup> ד"ה תרוייהו. The actual wording of פרש"י is; 'והוי דבר המוטל בספק'. See 'Thinking it over' # 2.

<sup>2</sup> The משנה there cites a case where two oxen (belonging to two separate people) were chasing a cow and one of the oxen killed it, each owner claimed that the other ox killed the cow. The משנה rules (like the רבנן) that המוציא מחבירו (רבנן) so if the owner of the cow cannot prove which ox killed, both of them are exempt from paying. While סומכוס maintains (as the גמרא there states) that since there is a doubt as to who is liable, they each pay half the damages (especially since we are certain that one of the oxen killed the cow).

<sup>3</sup> Each of the workers can claim that it may be that the other caused the damage; therefore unless you can prove that I caused it, I am exempt from paying (just as in the case of the oxen [footnote # 2]). See 'Thinking it over' # 2.

<sup>4</sup> See 'Thinking it over' # 1.

**So each of the workers should have paid close attention to his fellow worker, just as he should pay attention to himself, and warn his co-worker of any potential danger, and since he did not warn him, he is also negligent;** therefore both are liable since both are negligent.<sup>5</sup>

### **SUMMARY**

According to (understanding of) רש"י, each one is liable, because we are not sure who caused the damage. תוספות maintains that if it was a ספק they would both be פטור; they are חייב because they are both פושעים for each one should have warned his co-worker.

### **THINKING IT OVER**

1. What would be the ruling according to תוספות if one worker did warn<sup>6</sup> his co-worker?<sup>7</sup>
2. It would seem from the wording of רש"י (והוי דבר המוטל בספק and שעיוות אף המנהיג) רש"י is following the הלכה that נקט מנא משלם. In a case of מחזקי בגונדרא the question is whether מועט שעיוות אף המנהיג הוא נקט פרשא also has to pay, since ובדבר מועט שעיוות אף המנהיג הוא נקט פרשא (the נקט מנא certainly has to pay), but this is whether the מוטל בספק whether the נקט פרשא also has to pay. Therefore it is not clear why תוספות asks ואי הוה ספק הוי שניהם; at most the question should be that נקט פרשא פטור ואי הוה ספק הוי נקט פרשא פטור!
3. How are we to understand, that since each worker did not warn his co-worker,<sup>8</sup> therefore he should be held liable for not warning?<sup>9</sup>

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<sup>5</sup> See 'Thinking it over' # 3.

<sup>6</sup> See footnote # 4.

<sup>7</sup> See (ח"מ סי' שט ס"ד)

<sup>8</sup> See footnote # 5.

<sup>9</sup> See (לוריא ד"ה ואי) and מהרש"ם (שו"ת ח"א סי' ע"ז).